

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AECOM

Employer

and

Case 22-RC-238880

LOCAL 352, NATIONAL ASSOCIATION OF  
TRANSPORTATION SUPERVISORS  
Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied because it raises no substantial issues warranting review.<sup>1</sup>

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<sup>1</sup> In denying review of the Regional Director's finding that the Employer did not establish that the Line Supervisors, Controllers, and Lead Controllers ("Alleged Supervisors") effectively recommend discipline, we observe that the same result would obtain under the standards the United States Court of Appeals for the Third Circuit employs. See *NLRB v. New Vista Nursing & Rehabilitation*, 870 F.3d 113, 130–36 (3d Cir. 2017); see also *NLRB v. Attleboro Associates*, 176 F.3d 154, 164–66 (3d Cir. 1999). In the disciplinary context, the Third Circuit "recognize[s] three facts that together may show an employee is a statutory supervisor: (1) the employee has the discretion to take different actions, including verbally counseling the misbehaving employee or taking more formal action . . . ; (2) the employee's actions 'initiate' the disciplinary process. . . ; and (3) the employee's action functions like discipline because it increases severity of the consequences of a future rule violation . . . ." *New Vista*, supra at 132 (internal citations omitted). None of these facts is established on this record. To begin, there is a lack of evidence to show that the Alleged Supervisors have discretion to take different actions within the Employer's disciplinary process. Rather, the evidence shows that the Employer's policies often require the Alleged Supervisors to take a given action upon witnessing a violation, and the record lacks specific, detailed evidence concerning when and how the Alleged Supervisors can depart from the Employer's policies. The evidence also lacks a single specific or detailed incident even suggesting that an Alleged Supervisor exercised discretion in deciding whether or not to report an observed violation or to remove an Operator from his or her duties. Even if the Alleged Supervisors do have discretion to take different actions, the Employer has failed to establish that the Alleged Supervisors "initiate" a "progressive" disciplinary process. The Employer's disciplinary policy is not part of the record, and the testimony concerning it lacks sufficient detail to determine whether the Alleged Supervisors' actions actually initiate the disciplinary process or, if so, whether that process is indeed progressive, because there is no evidence that an Alleged Supervisor's report was used to increase the severity of discipline for a subsequent infraction, nor are there any actual disciplinary notices (as opposed to the Alleged Supervisor's reports) in evidence. See *Coral Harbor Rehabilitation and Nursing Center*, 366 NLRB No. 75, slip op. at 2, fn. 6 (2018). Finally, even assuming that effective recommendation of discipline could be found under the Third Circuit's test without the existence of a progressive-disciplinary system, because there are no examples of Alleged Supervisors' reports containing disciplinary

JOHN F. RING,	CHAIRMAN
MARVIN E. KAPLAN,	MEMBER
WILLIAM J. EMANUEL,	MEMBER

Dated, Washington, D.C., December 11, 2019.

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recommendations, the Employer has not shown that their reports function as effective recommendations for future discipline by increasing the severity of future infractions.

We agree that the Alleged Supervisors are not supervisors. We note, however, that the concerns articulated by the Third Circuit regarding the Board's test for whether putative supervisors may effectively recommend discipline warrant careful consideration, and we would be open to reconsidering extant Board law on this topic in a future appropriate case.

We additionally reject the Employer's contention, which it did not raise to the Regional Director, that the Alleged Supervisors assign work within the meaning of Section 2(11) of the Act. See Board Rules and Regulations, Sec. 102.67(e). Even if this were properly raised, there is no evidence that the Alleged Supervisors designate "an employee to a place," appoint "an employee to a time," or give "significant overall duties." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). At most, the Alleged Supervisors provide ad hoc instruction to Operators, as opposed to significant overall duties. Furthermore, even if the Alleged Supervisors assign "significant overall duties" to Clerks, they do not utilize independent judgment in making these assignments because there is only one Clerk per shift and, therefore, "only one obvious and self-evident choice" to whom the Alleged Supervisors can assign work. See *Id.* at 693.

Finally, in denying review of the Regional Director's determination with respect to responsible direction, we do not rely on his conclusion that because the Line Supervisors do not discipline or effectively recommend discipline, they likewise do not have the authority to take corrective action. See *Community Education Centers, Inc.*, 366 NLRB 85, 85 (2014). We agree, however, that the Employer has neither established that Line Supervisors exercise independent judgment in directing Operators, nor that Line Supervisors face the prospect of adverse actions based on the Operators' performance, as opposed to the Line Supervisors' own failings. Cf. *Mars Home for Youth v. NLRB*, 666 F.3d 850, 854 (3d Cir. 2011).